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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNEY DWAYNE WATKINS,

Defendant and Appellant.

G040139

(Super. Ct. No. O6CF0204)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick H. Donahue, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of numerous crimes for participating in a gang-related robbery of a Newport Beach jewelry store. In his first appeal, we rejected his challenge to the sufficiency of the evidence on the gang-related counts and enhancements. However, we found the trial court violated his Sixth Amendment right to a jury trial by sentencing him to the upper term on one of the robbery counts. (See generally *Cunningham v. California* (2007) 549 U.S. 270.) Therefore, we vacated his sentence and remanded the matter for resentencing.

In so doing, we rejected appellant's contention the court's error mandated that his upper term sentence be reduced to the midterm. We decided, "[T]he correct procedure is to remand the matter to the trial court for resentencing under the newly amended sentencing laws and Rules of Court, as explained by our Supreme Court in *People v. Sandoval* [2007] 41 Cal.4th [825,] 843-853. Under those laws and rules, the trial court will have the discretion to select among all three available terms — upper, middle or lower — in sentencing appellants anew. (*Ibid.*) Appellants contend this will expose them to double jeopardy, but as an intermediate court, we are powerless to depart from the procedure dictated by the *Sandoval* court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)" (*People v. Watkins et al.* (Nov. 27, 2007, G037555) [nonpub. opn.] at p. 10.)

On remand, the trial court resentenced appellant pursuant to *Sandoval*, and, as before, it sentenced him to the upper term on the subject robbery count. Appellant contends *Sandoval* was wrongly decided, and the resentencing procedures it established — and were followed here — violate the ex post facto clause, due process and equal protection. At the same time, appellant recognizes we are bound by the Supreme Court's decision in *Sandoval* under principles of stare decisis. (See *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) Indeed, we are constitutionally obliged to "accept the law declared by courts of superior jurisdiction"; "[i]t is not [our] function to attempt to overrule decisions of a higher court." (*Ibid.*) Therefore, we must affirm the

judgment and continue to follow *Sandoval* until any such time it is abrogated or overruled.

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.